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No. 94-80

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 19____

TAWANA WILSON, personal representative of the Estate of Jesse Wilson, deceased,
Petitioner,

v.

MUNICIPALITY OF ANCHORAGE, et al.; ANCHORAGE FIRE DEPARTMENT; INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1264; JERMAIN, DUNNAGAN, OWENS, P.C.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. The Court Should Grant The Petition To Resolve Whether The Respondents Successfully Combatted The Charge Of Denial Of Equal Protection And Conspiracy Because Of Leaving Wilson's Name From The Promotional Rehire List, Denying Him Union Fair Representation, Denying Him The Right To Return Within One Year To His Inspector's Position Under 5.2(b) And Denying Him The Right To Return Within Two Years Under 10.1.3.

II. The Court Should Grant The Petition

To Determine Whether The Denial Of The Benefit Of The Arbitrator's Findings Could Be Justified When No Civil Rights Issues Were Presented To The Arbitrator, Only Contractual Issues.

III. The Court Should Resolve The Question Of Whether Granting Substitution And The Super Imposition Of An Extra Burden On A Black Litigant Takes Away His Equal Protection Rights.

ARGUMENT

I. Respondents Have Not Combatted The Charges Of Denial Of Equal Protection And Conspiracy Because Of Leaving Wilson's Name From The Promotional Rehire List, Denying Him Union Fair Representation, Denying Him The Right To Return Within One Year To His Inspector's Position Under 5.2(b) And Denying Him The Right To Return Within Two Years Under 10.1.3.

The contention that there was never a claim that Wilson was in fire suppression is false. This was the only attempt at justification which respondents gave for

requiring Wilson to return as a firefighter III. The exact words are found at the record at CR 44-27, 28, n. 1, where the statement is made that since he was in fire suppression, the highest rank at which he could have possibly returned was firefighter III.

Plaintiff below sought sanctions because of this deliberate fallacious statement but the judge denied the motion for sanctions as well as the motion to strike submitted by the municipality without comment as to the false statement. The municipality wanted the reference to the false statement stricken. This is covered on page 7 of the original opinion below in the following words:

> I have considered defendants' motion to strike at Docket No. 61 and plaintiff's motion for sanctions at Docket No. 66 and find them to be without merit.

Admittedly, under the union contract if Wilson had been in fire suppression, he would have been required to return as a firefighter III. This clarification appears in a letter from JDO at CR 53-50.

Another fallacious statement appears in the statement of facts as presented by the respondents in the contention that a requirement to become an inspector required that you serve a certain length of time as a firefighter II. This appears on page 5 of the brief. At no time in the brief is there a reference to a particular rule justifying the action of the respondents.

Their reference to Title 18 as a means of keeping Wilson from returning as an inspector is without merit as no part of Title 18 deals with inspectors. Included therein are the positions of Fire Apparatus Engineer, Fire Captain, Senior Fire Captain and Paramedic II. The contention is further without merit as had there been an inclusion of inspector, there would have been no reason for leaving Wilson's name off the promotional list pursuant to rights guaranteed by 5.2(b).

It is strange that despite the rights given by 5.2(b) and 10.1.3, some strange act occurs without explanation for holding that Wilson was not entitled to these rights. No explanation is given anywhere

for why he was not given the benefit of his rights under personnel rules and the union contract. Even if the weak contention set forth that the fire department had not considered Wilson's termination due to a non-occupational illness, no explanation is given as to why he was not given the benefit of 5.2(b) which gives the right to return within a year to the same position. All municipal employees got this right. He returned in nine months. No legitimate business reason is ever given for why Wilson was kept from the rehire and promotional list, why he was denied the benefit of personnel and union contract agreements.

The way in which the rules were changed requiring that a member could only work through the union is shown in the record at CR 23-5. The way in which the fire department continued to advertise, having admittedly filled four union inspector positions during the period that Wilson was trying to return is not explained. We are still faced with the *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), 3(L.Ed. 688 theory of what logical legal business reason

could be given. None ever was.

Why did both courts insist that Wilson had an obligation to show that the respondents historically discriminated against blacks? Wilson had explained that he was not bringing a disparate treatment case as he was bringing the case strictly as an individual.

If no significance was attached to the fact that one of the four persons hired was a minority, why was it given prominence in the opinion of the district court and the opinion of the appellate court?

II. The Court Should Grant The Petition To Determine Whether The Denial Of The Benefit Of The Arbitrator's Findings Could Be Justified When No Civil Rights Issues Were Presented To The Arbitrator, Only Contractual Issues.

Can the rights given by an arbitrator's findings and conclusions be taken away when neither side appealed? Alaska law pertaining to appeals from arbitrators' awards provides that "the appeal shall be taken in the manner and to the same extent as from orders or

judgments in a civil action." AS 09.43.160.

Neither side appealed from the arbitrator's decision. Even though the arbitrator's decision was in favor of the municipality, it was only because of the fact that the union and the union attorney had violated the time constraints. JDO knew of this violation as a letter by a member of its firm had been written showing that the time had passed which is shown in the following words:

> Therefore, assuming that a grievance is available, it is my opinion, under the facts of this case and the language contained in the grievance procedure in the Agreement, that the chances of winning this grievance at arbitration are almost none. CR 53-41, p. 2.

The bringing of the question before the arbitrator was really a sort of save face gesture on the part of the union and JDO, the attorneys, since they were fully aware of time constraints, yet the question was presented to the arbitrator as to whether or not Wilson had 10.1.3

rights. The arbitrator found that he did.

The district court and the court of appeals referred to the case of *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) as showing that the decision of the arbitrator was not binding in a certain type of case. This was a civil rights case. However, that case could not be applicable to the situation here since the civil rights issue was not presented to the arbitrator. That phase of the case was given no attention by the union or the union attorney yet the union clearly admitted its error by stating in its excedrin letter:

> "As discussed Jesse Wilson should have been placed as an unranked eligibile (sic) per personnel rule 5 (b). This was recently discovered as Jesse and Ken McCoy were exploring the questions of under what rule was Jesse hired. What if any benifit (sic) to Jesse is there when considering PPI5100-004 sec. 3.4.9 along with now being listed as an unranked eligible.

> Enclosed are the relevant documents. thanks Chuck, Julie, Brad Ownens (sic) and the entire JDO staff who must resort to excederin (sic) assisting with difficult Firefighter issues!!!!!" CR53-50

We find these words at page 1800 of the case of *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984):

> (b) Although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would

undermine the statute's efficacy in protecting federal rights. This conclusion is supported by the facts that an arbitrator may not have the expertise to resolve the complex legal questions that arise in § 1983 actions or the authority to enforce § 1983; that a union's usual exclusive control over grievance procedures may result in an employee's loss of an opportunity to be compensated for a constitutional deprivation merely because it was not in the union's interest to press his grievance vigorously; and that arbitral factfinding is generally not equivalent to judicial factfinding. Pp. 1802-1804.

Only contractural issues were presented to the arbitrator so they should be accorded full effect. This was the only evidence presented in the case as the district court took no testimony.

III. The Court Should Resolve The Question Of Whether Granting Substitution And The Super Imposition Of An Extra Burden On A Black Litigant Takes Away His Equal Protection Rights.

If no significance was attached to the fact that one of the four persons hired was a minority, why was it given prominence in the opinion of the district court and the opinion of the appellate court? Both courts have emphasized the fact that another minority was promoted to one of the positions sought by Wilson. This court has never passed on the issue of minority substitution. Both courts have emphasized the fact that Wilson did

not show the deprivation or conspiracy to have been based on ethnicity. Is this to be a new requirement superimposed upon a minority? This issue has never been decided by this court.

CONCLUSION

Despite many references to cases bearing no similarity to the issue here, respondents have done nothing to dispel the fundamental premise that the constitutional rights of Wilson were violated and that he was denied equal protection as guaranteed by the Fourteenth Amendment by the combined acts of the municipality, the union, the fire department and the Union attorneys despite his failure to quote anyone as saying: "We are doing this because you are black."

DATED at Wasilla, Alaska this 1st day of August, 1994.

DICKERSON & GIBBONS, INC.

BY_____

M. ASHLEY DICKERSON

Certificate of Service

This is to certify that copies of the foregoing document were mailed to the Supreme Court of the United States and delivered to messenger for service on the following this ____ day of August, 1994:

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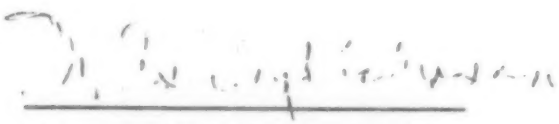

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